



**Australian
Competition &
Consumer
Commission**

Application for Authorisation

**Australian Direct Marketing Association
Direct Marketing Code of Practice**

Date: 16 August 1999

Authorisation No:
A40077

Commissioners:
Fels
Asher
Shogren
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File No: CA 98/25

Summary

The Commission has considered an application for authorisation lodged by the Australian Direct Marketing Association ('ADMA'). Application A40077 was made under sub-section 88(1) of the *Trade Practices Act* ('the Act') for an authorisation to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act, and to give effect to such a contract arrangement or understanding. The application concerned ADMA's arrangements to adopt a Direct Marketing Code of Practice ('the Code of Practice') and enforce the provisions contained in that Code.

The provisions contained in the Code of Practice are drawn from a range of sources. Parts B and C are based on the Model Code of Practice for the Direct Marketing Industry that was approved by the Ministerial Council on Consumer Affairs in 1997. Part D is based on the Draft Recommendation of the Council Concerning Guidelines for Consumer Protection in the context of Electronic Commerce that was released by the OECD in 1998, while Part E is based on the National Principles for the Fair Handling of Personal Information released by the Commonwealth Privacy Commissioner in February 1998.

Many provisions contained in the Code of Practice drew criticism from a range of interested parties. Attachment B to this determination lists the interested parties that made submissions.

The Commission found that the application of the provisions of the Code was often limited by the Code's narrow definition of direct marketer. Consequently, many of the provisions may only apply where an ADMA member had entered into a contract with a customer for the sale of goods or services that was negotiated at a distance, and a record of that transaction was captured and maintained on a list or database for further marketing purposes. The Commission considered that little or no public benefit arose from such limited application and has required ADMA to make a number of amendments in order to broaden the scope of the Code. Incorporation of these amendments means that at its narrowest provisions contained in the Code will apply to ADMA members who contact potential customers via a means of distance communication and invite consumers to respond using a means of communication at a distance with the intention of supplying goods and services under a contract negotiated at a distance. At its broadest, the Code will apply to all ADMA members.

The Code contains a number of rules outlining standards of fair conduct generally, standards relevant to telemarketing, standards relevant to electronic commerce, and standards relevant to consumer data protection. The Commission is of the view that these rules, once the subject of appropriate scope and a number of other amendments (see paragraph 9.3 of this determination), have the potential to give rise to a number of public benefits in so far as they:

- provide consumers with rights additional to those that are granted at law, for example, the right to a seven day cooling off period and to a refund in appropriate circumstances;
- protect consumers from unreasonably intrusive forms of direct marketing, and protect consumers' right to privacy; and

- provide consumers with recourse to a resolution mechanism where they have complaints about products or services they have purchased, or the conduct of an ADMA member.

However, the Commission considered that the extent to which the Code would in practice be likely to benefit the public depends upon the level of compliance with the Code's rules. The Commission had a number of concerns with the structure and operation of the Code's enforcement provisions including, the independence and accountability of decision-making bodies, the remedies available, and the complaints handling process. The Commission thus required a number of amendments (see paragraph 9.3 of the determination) to the enforcement provisions of the Code.

The Commission has granted authorisation in respect of the Code of Practice until 16 August 2003. However, the authorisation will not come into force until the Commission notifies ADMA that it is satisfied that the Code has been amended in accordance with the conditions set out in paragraph 9.3 of the determination.

The authorisation is subject to additional conditions requiring ADMA to keep its Code up to date with regulatory developments as reflected in amendments to the Model Code of Practice for the Direct Marketing Industry, the OECD Guidelines for Consumer Protection in the context of Electronic Commerce, and the National Principles for the Fair Handling of Personal Information, on which ADMA's Code is based.

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Glossary

ACA	Australian Consumers' Association
ACS	Australian Computer Society
ADMA	Australian Direct Marketing Association
A-G's	Information and Security Law Division – Attorney – General's Department
APAC	Austel Privacy Advisory Committee
APCC	Australian Privacy Charter Council
APF	Australian Privacy Foundation
ATCCA	Australian Telemarketing and Call Centre Association
ATUG	Australian Telecommunications Users Group
the Act	Trade Practices Act
the Authority	Code Authority
the Board	ADMA's Board of Directors
CAD	Consumer Affairs Division of the Treasury
CCLS	Consumer Credit Legal Service
CEO	ADMA's Chief Executive Officer
CFA	Consumer's Federation of Australia
CIRS	Community Information and Referral Service of the ACT
Code of Practice	Direct Marketing Code of Practice
Compliance Officer	Code Compliance Officer
the Commission	Australian Competition and Consumer Commission
EFA	Electronic Frontiers Australia
FSCPC	Financial Services and Consumer Policy Centre
IIA	Internet Industry Association

MCCA	Ministerial Council on Consumer Affairs
Model Code	Model Code of Practice for the Direct Marketing Industry
NPPs	National Principles for the Fair Handling of Personal Information
NSWPC	New South Wales Privacy Committee
PC	Privacy Commissioner
PN	Policy Network
the Tribunal	Australian Competition Tribunal
XC	Xamax Consultancy

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1. Introduction

- 1.1 On 2 September 1998 the Australian Direct Marketing Association ('ADMA') lodged an application with the Australian Competition and Consumer Commission ('the Commission') regarding its Direct Marketing Code of Practice ('Code of Practice').
- 1.2 Application A40077 was made under subsection 88(1) of the Trade Practices Act ('the Act') for authorisation:
 - to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect of, substantially lessening competition within the meaning of section 45 of the Act, and
 - to give effect to such a contract, arrangement or understanding.
- 1.3 The application concerned ADMA's proposed arrangements to adopt a Direct Marketing Code of Practice and to enforce the provisions contained in that Code.
- 1.4 On 7 October 1998, the Commission issued a draft determination in which it proposed to grant authorisation to application A40077 subject to the outcome of any pre-decision conference and subject to the applicant satisfying a number of conditions.
- 1.5 On 5 November 1998, ADMA forwarded to the Commission, an amended version of its Code, which it submitted, would address the Commission's concerns as raised in its draft determination.
- 1.6 On 9 November 1998, ADMA launched its amended Code of Practice and it is the amended Code that is the subject of this determination.

2. Background

Direct Marketing

- 2.1 Marketing is a form of communication between a marketer of goods or services and a prospective customer. It is usually intended to induce a prospective customer to purchase the relevant good or service and may include the provision of information pertaining to features, conditions of purchase, availability etc.
- 2.2 Direct marketing is one form of marketing and generally involves marketers communicating with a prospective customer, without the use of an intermediary, via a medium that supports some degree of interaction¹. It is a broad ranging practice that may involve the receipt of marketing information through the following mediums:
- mail, for example, unaddressed printed matter, letter, catalogues;
 - fax;
 - telephone; and
 - electronic channels, for example, e-mail.
- 2.3 Participants in direct marketing can be divided into two broad groups:
- users of direct marketing techniques ; and
 - suppliers of direct marketing services.
- 2.4 Users of direct marketing techniques comprise a large group, including companies involved in business and industrial services, charities and fundraisers, consumer product manufacturers and distributors, financial services, health care, industrial product manufacturers and distributors, telecommunications companies, travel services, airlines, hotels and retailers.
- 2.5 Suppliers of direct marketing services include companies involved in computer services and software database management, delivery and distribution, direct marketing and advertising agencies, electronic media and interactive services, lists, mailhouses and fulfilment services, and telemarketing services.

The Australian Direct Marketing Association

- 2.6 ADMA was established in 1966 as a non-profit body to represent the collective interests of its members. Its members comprise sole traders, bodies corporate, partnerships, unincorporated associations, employees and other persons who carry on a business, practice or engage in the direct marketing industry in Australia.

Dr Roger Clarke, *Direct Marketing Privacy*, p.2 of Attachment A of the submission of Xamax Consultancy Pty Ltd dated 21 October 1998.

- 2.7 ADMA currently represents over 400 organisations involved in direct marketing including financial institutions, publishers, catalogue and mail-order traders, airlines and travel service providers, charities and fundraisers, call centres and telecommunication service providers, printers and advertising agencies, list and data base specialists, mail houses and fulfilment services. ADMA estimates that its members are responsible for approximately 80% of annual sales derived from the use of direct marketing techniques.
- 2.8 ADMA conducts advocacy, education and networking activities for the benefit of its members and administers a Code of Practice, compliance with which is compulsory for all of its members.

The Model Direct Marketing Code of Practice

- 2.9 In November 1997, the Ministerial Council on Consumer Affairs ('MCCA') approved the release of a Model Code of Practice for the Direct Marketing Industry ('the Model Code'). The Model Code was drafted by a Direct Marketing Working Group which was chaired by a Commission staff member and comprised representatives from state and federal government consumer departments, privacy bodies, consumer groups and ADMA. After significant consultation with stakeholders in the direct marketing industry the Model Code was endorsed by the MCCA who encouraged industry associations whose members were involved in direct marketing to establish their own codes, based upon the provisions contained in the Model Code.
- 2.10 A short time after finalisation of the Model Code, ADMA's Executive began the process of modelling its own Code based on the provisions contained in the Model Code. ADMA's Code of Practice, which is the subject of this application, is the result of that process. Except with respect to the area of dispute handling, it is based largely on the Model Code, with the addition of Parts D and E concerning fair conduct relevant to electronic commerce and consumer data protection respectively.

3. Application

- 3.1 The application which has been lodged on ADMA's behalf and its supporting submissions are on the public register that is maintained by the Commission. A copy of the amended Code of Practice is Attachment A to this determination.

Overview of the Code

- 3.2 The Code of Practice sets out specific standards of conduct for participants in the direct marketing industry in relation to their customers and the public and serves as a benchmark in settling disputes between direct marketing industry participants and their customers. All members of ADMA and their employees, agents or sub-contractors are bound by the Code of Practice. However, various provisions of the Code, including the data protection provisions of Part E, apply only to direct marketers as defined in the Code and therefore do not apply to all ADMA members.
- 3.3 The Code of Practice is divided into seven parts:
- Part A - Introduction;
 - Part B - Standards of fair conduct;
 - Part C - Fair conduct relevant to telemarketing;
 - Part D - Fair conduct relevant to electronic commerce;
 - Part E - Fair trading relevant to consumer data protection;
 - Part F - Enforcement; and
 - Part G - Code Review and Amendment.

A brief outline of the key provisions contained in each Part is provided below.

Part A - Introduction

- 3.4 Part A outlines the purpose of the Code of Practice, why it is necessary, its scope and its objectives. Clause 5 provides that the objectives of the Code of Practice are to:
- ensure customers have access to the product and service information they need to make informed choices;
 - minimise the risk of direct marketers breaching the Trade Practices Act 1974 or state fair trading legislation;
 - promote a culture among direct marketers of conducting their businesses fairly, honestly, ethically and in accordance with best practices; and

- increase consumer confidence in doing business with ADMA members.

Part B - Standards of fair conduct

- 3.5 Part B outlines standards of fair conduct that will apply to the general business of direct marketing. It covers a number of issues including misleading and deceptive conduct, false claims, the information which should be given to a potential customer at the time an offer is made and the information which should be given at the time the relevant product is delivered.
- 3.6 Clauses 10 - 13 outline rules that must be followed where direct marketers offer incentives. Clause 10 provides that the terms and conditions under which incentives, including prizes, gifts or other rewards are offered must be clearly stated. This includes disclosure of the manner in which a gift, prize or reward will be drawn or awarded and whether or not its provision is conditional on the customer purchasing goods or services from the direct marketer. Clause 11 provides that such gifts etc must be made available to the customer in the period of time which is stated in the offer, or if no period of time is stated, within 30 days of the customer purchasing goods or services from the direct marketer. Clause 13 outlines the rules that will govern the conduct of lotteries and contests. It provides that a direct marketer who intends to conduct a lottery or contest must make available at the point of entry, the rules which govern the contest, ensure that judging takes place promptly and fairly and is certified by an independent auditor and make the results of the contest or lottery available to participating customers who request them.
- 3.7 Clauses 15 to 18 deal with delivery. Clause 15 provides that where a direct marketer has not specified a date for delivery then the goods or services must be delivered within thirty days. Clause 16 provides that where an order cannot be delivered within the specified time, or within 30 days, the direct marketer must send the customer an initial notice acknowledging the order. The notice must state the date on which the order is expected to be delivered, the reason for the delay and offer the customer the opportunity to cancel the order and receive a full refund of any money paid. Clause 17 provides that where a direct marketer is not able to deliver the goods or services by the date stated in the initial notice the direct marketer must either advise the customer that it is unable to fulfil the order and refund the customer any money paid, or notify the customer of the new expected delivery date providing a reply-paid or other cost-free response mechanism and including an option to refund any money paid. Clause 18 states that if the direct marketer is unable to deliver the goods or services within the time specified in the second notice, the procedure outlined in clause 17 must be repeated until the goods or services are delivered or the transaction has been cancelled and any moneys paid refunded.
- 3.8 Under clause 19 a direct marketer must not request or accept payment for goods or services if it intends to supply goods or services which are materially different from those which have been paid for, or if there are reasonable grounds for believing that the direct marketer will not be able to supply the goods or services within the period in which it has specified, or if no time has been specified, within 30 days.

- 3.9 Clauses 20 - 30 set down procedures which must be followed with respect to cancellation of orders and refunds. Clause 20 provides that each contract which a direct marketer makes with a customer must contain a provision stating that the customer has the right to cancel the contract within a period of time that is not less than seven days and at any time before the goods or services are dispatched to the customer. Clauses 31 and 32 set down rules with respect to minors, while clauses 33-39 deal with unordered or substituted goods or services.
- 3.10 Clause 40 provides that direct marketers must have a procedure in place to deal with complaints from consumers, the procedures must comply with the Australian Standard for Complaints Handling, AS 4269.

Part C - Fair conduct relevant to telemarketing

- 3.11 Part C sets down standards of fair conduct that relate specifically to telemarketing. Clauses 1 - 3 outline procedures that a telemarketer must follow with respect to the provision of identification information. Clause 1 provides that a direct marketer must ensure, at the earliest opportunity in an outbound telemarketing call, that the following information is provided to the customer, and repeated if the customer at any time requests:
- the name of the person making the telephone call;
 - where a service bureau is making the call, the name of the organisation on whose behalf the call is being made; and
 - the purpose of the telephone call.
- 3.12 Clause 4 outlines the information that the telemarketer must provide to customers who request it. The information includes the telemarketer's name and contact details, the name of the person who is responsible for handling customer inquiries which the telemarketer receives, further details concerning the goods or services being offered and details of the source from which the telemarketer obtained the customer's personal details.
- 3.13 Clause 6 provides that a telemarketer must not represent that they are undertaking market research where the purpose of the call is to sell a good or service. Clauses 7 and 8 outline acceptable calling conduct, while clauses 9 - 12 contain provisions which deal with permitted calling times, line disconnection times and calling frequency.

Part D - Fair conduct relevant to electronic commerce

- 3.14 Part D contains provisions outlining appropriate conduct that is specific to electronic commerce. Clause 1 provides that this form of commerce will have the same level of protection as that provided by the practices which apply to other forms of commerce. Clause 2 states that clear, complete and current information about the identity of the business engaged in electronic commerce and about the goods or services that they

offer should be provided to customers. Clause 3 provides that acceptance of an offer online should be informed and unambiguously expressed by the customer in a format that allows the parties to maintain a complete and accurate record of the contracts.

Part E - Fair conduct relevant to consumer data protection

- 3.15 Part E outlines procedures that direct marketers must follow with respect to the information they compile from customers. Clauses 1 - 8 deal with the collection of personal information. Clause 1 provides that a direct marketer can only collect personal information that is necessary for one or more of its legitimate functions or activities. Clause 2 provides that such information should be collected by lawful and fair means and not in an unreasonably intrusive way. Clause 3 outlines a number of facts of which a person who is having personal information collected about them should be aware of at the time that the information is being collected. It includes matters such as the identity of the organisation and how to contact it, the fact that the customer is able to gain access to the information and the purposes for which the information is collected.
- 3.16 Clause 9 deals with the circumstances in which direct marketers can use and disclose a customer's personal information. A direct marketer can only use or disclose personal information for a purpose other than a primary purpose of collection in certain circumstances. These circumstances include circumstances where the secondary purpose is related to the primary purpose of collection and the subject of the information would reasonably expect the organisation to use or disclose the information for the secondary purpose or the individual has consented to the disclosure.
- 3.17 Clauses 10 -11 set out the procedure for determining the primary purpose of collection while clauses 12 - 13 outline the reasonable expectation test. Clauses 14 -18 discuss data quality, data security and a direct marketer's openness with respect to its data.
- 3.18 Clauses 19 - 26 set out procedures with respect to access and correction of data. Clause 19 provides that where a direct marketer holds personal information about an individual it should provide the individual with access to the information on request except in certain circumstances. These circumstances include instances where providing access would pose a serious and imminent threat to the life and health of any individual, providing access would have an unreasonable impact on the privacy of other individuals, providing access would be unduly onerous to the organisation or where the information relates to existing legal dispute resolution proceedings between the organisation and the individual and the information would not be accessible by the process of discovery in those proceedings. Clause 24 provides that where a direct marketer holds personal information about an individual and the individual is able to establish that the information is not accurate, complete and up to date, the organisation should take reasonable steps to correct the information so that it is complete, accurate and up to date.
- 3.19 Clauses 27 - 30 deal with the use of identifiers, anonymity and trans- border flows while clauses 31 -32 set down procedures which must be followed with respect to sensitive information.

- 3.20 Clause 33 and 34 are headed 'Respecting Consumer Preference'. Clause 33 requires direct marketers to use the Do Not Mail/Do Not Call services of ADMA when conducting a direct marketing campaign. Clause 34 requires a direct marketer to remove a customer's name from all internal marketing lists or lists for transfer to a third party at the request of a customer.

Part F - Enforcement

- 3.21 Part F deals with enforcement. Clause 1 provides that the scope of ADMA's enforcement procedures will be limited to alleged breaches of the Code of Practice and does not include mediation of consumer complaints which would normally be dealt with by a member's internal complaints handling process. Where customer complaints do involve an alleged breach of the Code, and are not resolved under a member's internal complaints handling process, clause 1 states that they must be referred by the member to ADMA as a customer complaint under Part F. Clauses 2 and 3 outline the manner in which a complaint can be made to ADMA, while clauses 4 - 16 outline the manner in which ADMA will respond to complaints.
- 3.22 Clauses 4, 5 and 6 deal with the process that will be undertaken where ADMA's Code Compliance Officer ('Compliance Officer') does not believe that there has been a breach of the Code of Practice, or where there has been a potential breach of the Code of Practice by a non-member. Where the Compliance Officer considers that an ADMA member may have breached the Code of Practice, the Compliance Officer will write to the member outlining the particulars of the alleged misconduct and requesting a written response within 14 days. If the member is not able to demonstrate compliance within a reasonable period of time the compliance officer must refer the complaint to the Code Authority ('the Authority') for its consideration. The Authority is defined in the Code of Practice as being an Authority established by ADMA that consists of an independent Chairperson, two consumer representatives, being persons with special competence in consumer or industry matters; and three industry representatives, being persons of good character and repute in the direct marketing industry. Upon reviewing the complaint, the Authority may direct the Compliance Officer to investigate the complaint further and report the results of the investigation to the Authority, or cause the Compliance Officer to send a notice to the member inviting them to attend a hearing regarding the alleged breach or resolve not to further pursue the alleged breach. Clauses 11 - 16 outline the procedure that will take place at a hearing before the Authority. The direct marketer will receive a written notice of the Authority's decision within 14 days, and is then given 14 days to comply with the decision. If the member is not able to demonstrate compliance, ADMA's Chief Executive Officer ('CEO') will call a special meeting of the Board of Directors ('the Board') to consider removing the member from ADMA, subject to the recommendation of the Authority.
- 3.23 Clause 17 outlines the sanctions that the Authority may impose where it finds that a member has been in breach of the Code. These include:
- requiring the member to take specified remedial action to correct the breach and avoid re-occurrence;

- seeking a written undertaking from the member that the breach will not be repeated;
 - seeking the approval of the ADMA Board to issue a formal written admonition to the member;
 - seeking the approval of the ADMA Board to publish the written admonition; and
 - recommend to the CEO that membership is revoked.
- 3.24 Clause 18 provides that the Authority may only recommend issuance of a formal admonition where the breach is of a serious nature and has occurred more than twice in the preceding 12 months. Clause 19 provides that the Authority may only recommend publication of a formal written admonition, or revocation of membership, where the member has committed multiple breaches of the Code over an extended period of time and demonstrated an ongoing disregard for the Code.
- 3.25 Clause 20 provides that no fees or charges will be levied by ADMA with respect to the enforcement procedures under Part F, and that complainants bear their own costs.
- 3.26 Clause 21 provides that ADMA will publish in its Annual Report:
- the number of complaints received by the Compliance Officer during that year;
 - the number of breaches established by the Compliance Officer and the Authority during that year;
 - an analysis of the enforcement action taken during that year; and
 - a statistical analysis of complaints by company.

Part G - Code Review and Amendment

- 3.27 Part G outlines the procedures for reviewing and amending the Code of Practice. Clause 1 provides that the Code of Practice will be reviewed one year after it has been adopted, and every three years thereafter. Clause 2 provides that the Authority, who must consult with groups affected by the Code of Practice where appropriate, will conduct the review. Clause 4 provides that the Board may at any time resolve to amend the Code, after receiving such recommendations from the Authority.

4. Statutory Test

- 4.1 This application has been made under sub-section 88(1) of the Act.
- 4.2 In the case of an authorisation relating to a contract, arrangement or understanding which may substantially lessen competition in terms of section 45 of the Act, the relevant test that must be satisfied in order for the Commission to grant authorisation is contained in sub-section 90(7) of the Act.
- 4.3 Sub-section 90(7) provides that the Commission may only grant authorisation if it is satisfied in all the circumstances that:
- the provisions of the subject arrangements or conduct have resulted, or are likely to result in a benefit to the public, and;
 - the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provisions.
- 4.4 In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements, the public benefits arising from the arrangements, and then weigh the two to determine which is the greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation outright or grant authorisation subject to conditions.
- 4.5 If there are no public benefits arising from the conduct, the Commission may refuse authorisation. Alternatively, in refusing authorisation, the Commission may indicate to the applicant how the application could be constructed to change the balance of detriment and public benefit so that the authorisation may be granted.

5. Submissions of Applicant

Anti-competitive detriment

- 5.1 The applicant submits that the proposed arrangements in the Code of Practice, which have the potential for anti-competitive detriment, are:
- the conduct of ADMA members is restricted beyond that required by the relevant State, Territory, and Commonwealth legislation;
 - the imposition of sanctions (including the revocation of membership of ADMA) where a member is found to be in breach of the Code of Practice; and
 - the imposition of sanctions against the member where an agent, or subcontractor of the member is found to be in breach of the Code of Practice.
- 5.2 The applicant submits that the Code of Practice's requirements with respect to the information to be provided when an offer is made to a potential customer and at the time of delivery, the procedures to be adhered to when delivery is delayed, the requirement to provide in most cases a cooling off period of 7 days or more within which the customer may cancel the purchase contract, the requirement that telemarketer's identify themselves to potential customers, limiting the times when telemarketers may telephone potential customers and limiting the methods of collection of personal information and the use and disclosure of such information are relatively prescriptive. The applicant further submits that given the ADMA member profile, these restrictions have the potential to standardise the way in which participants in the direct marketing industry conduct their business and that such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another.
- 5.3 The applicant contends, however, that the standards do not go beyond what is widely accepted as prudent and fair business practices. It is submitted that the restrictions have no impact on the scope that direct marketing participants have to differentiate themselves via their products and the type of technology used to contact potential members to transact a sale. The applicant further submits that the restrictions on the conduct of ADMA members are directed towards promoting the interests of consumers rather than the prevention of competition between members.
- 5.4 With respect to the imposition of sanctions, the applicant submits that their availability is directed at encouraging compliance with the Code of Practice without unduly burdening ADMA members. The applicant acknowledges that a significant number of participants in the direct marketing industry are members of ADMA and that therefore the imposition of a sanction where membership of ADMA is revoked has the potential to be anti-competitive. The applicant submits that the inability of a direct marketing participant to be an ADMA member may mean that the participant suffers detriment as a result of the following:
- potential customers, whose policy is to deal only with an ADMA member, may refuse to deal with the participant;

- the participant will be denied access to the advocacy, education and networking activities conducted by ADMA; and
- members whose policy is to deal only with the other ADMA members may refuse to deal with a supplier.

Public Benefits

5.5 The applicant submits that a number of public benefits will result from giving effect to the arrangements contained in the Code of Practice. These claimed public benefits include:

- Significant promotion and enhancement of consumer protection. It is submitted that the restrictions on the conduct of ADMA members will protect consumers by ensuring they have access to the product and service information they need to make informed choices; respecting privacy; promoting a culture among direct marketers of conducting their business fairly, honestly, ethically and in accordance with best practices; and protecting consumers from false, misleading or unsafe claims.
- Ensuring members put in place appropriate consumer complaint handling procedures;
- Providing consumers with a flexible complaint handling procedure in relation to alleged breaches of the Code of Practice by ADMA members.
- Responsible development of the direct marketing industry which will increase supply, provide consumers with more purchasing options, promote competition and market efficiency, thereby exerting downward pressure on prices and increase access to, and demand from, off-shore markets which will boost the volume of exports.
- Promotion of consumer confidence to make purchasing decisions by a direct marketing method which will enable consumers to take advantage of more convenient methods of purchase and is likely to enable consumers to benefit from lower prices made possible by the lower cost structures required for direct marketing sales compared to shop front retail sales.
- Consumer views being taken into account by the presence of an independent chair and consumer representatives on the Code Authority. Member sanctions recommended to the Board of Directors of ADMA by the Code Authority will therefore be a product of public input.
- The promotion of equitable dealings in the direct marketing industry.
- Improvement in the quality and consistency of the service received by consumers from direct marketers.

- 5.6 The applicant submits that most members of the public at some stage in the last year will have been contacted by, or viewed advertisements of, a direct marketer. At times, the applicant submits, the person contacted may have been a minor, intellectually impaired or have poor language skills. The person may not have chosen to be contacted and may not have had sufficient opportunity to research the goods or services offered so as to minimise his or her risk of making an ill-informed decision. The applicant further contends that there is an inherent risk associated with distance selling given that there is no opportunity to inspect the goods prior to entering into a purchase contract. It is submitted by the applicant that these restrictions distinguish the direct marketing industry from the shop-front retail industry and necessitate greater restriction on the conduct of direct marketing industry participants so that the disreputable acts of a few do not jeopardise the reputation of the majority.
- 5.7 The applicant submits that by developing a Code of Practice, ADMA is responding to a need to provide customers and potential customers with further, but not onerous, safeguards to protect their interests. ADMA also submits that in the absence of a Code of Practice, its members will lack guidance as to responsible and appropriate conduct with the probable result that the direct marketing industry will be harmed.
- 5.8 The use of sanctions, such as revocation of ADMA membership is viewed by the applicant as necessary to deter irresponsible conduct and encourage compliance with the Code of Practice. The applicant contends that administration of the sanctions by the Authority and the Board will be undertaken with a high level of propriety, and will involve fairness and impartiality.
- 5.9 ADMA proposes to publicise its Code of Practice widely throughout the community and among business. ADMA hopes to raise the public awareness of the Code of Practice and instil an expectation about how industry participants will conduct themselves.
- 5.10 On the basis of the above, the applicant submits that the Code of Practice would result, or be likely to result, in a benefit to the public which would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the arrangements were given effect to.

6. Draft Determination

6.1 On 7 October 1998 the Commission released its draft determination with respect to application A40077. It proposed to grant authorisation in respect of the application for a four-year period subject to the outcome of any pre-decision conference and subject to the applicant satisfying the following conditions:

1. The Code of Practice is amended to provide that where a complaint which may involve an alleged breach of the Code is not resolved at the business level, members are required to refer the complaint to ADMA to be dealt with via the procedures that are laid down in the Code of Practice
2. The Code of Practice is amended to guarantee independence of the Chair of the Code Authority.
3. The Code of Practice is amended to define the composition of the Authority and provide for equal representation. For example, the Authority should be comprised of an independent chair, one consumer representative and one industry representative.
4. The Code of Practice is amended to provide all parties to a complaint with equal opportunity to participate fully in the enforcement process and ensure that all parties are provided with reasons for any decisions that are made which affect their case. The Code is amended so that complainants have the right to request the Code Authority to review any decision by the Compliance Officer that the Code has been breached.
5. The Code of Practice is amended to specify the breadth of the remedial orders and sanctions which the Authority is empowered to recommend. Guidelines outlining the instances when particular types of remedies or sanctions will be recommended should also be included.
6. The Code of Practice is amended to provide that there are no fees for lodging a complaint or defending an allegation under the Code.
7. The Code of Practice is amended to provide for a system which records and reports all of the complaints which have been received by the Compliance Officer in relation to alleged breaches of the Code and outlines the action which has been taken in regard to the complaints. The Commission considers that inclusion of such information in the ADMA Annual Report would be satisfactory.

7. Pre-Decision Conference and Submissions received following the Draft Determination

- 7.1 After issuing its draft determination (a copy of which is on the Commission's public register), the Commission invited submissions from a range of interested parties who were asked to comment on both ADMA's application and the Commission's draft determination. The names of those parties who made written submissions are listed at Attachment B. Copies of their submissions have been placed on the public register that is maintained by the Commission.
- 7.2 A pre-decision conference was requested by the Financial Services Consumer Policy Centre ('FSCPC'), Australian Privacy Charter Council ('APCC'), Consumers' Federation of Australia ('CFA'), Australian Privacy Foundation ('APF'), Graham Greenleaf, and Robin Whittle of First Principles. The conference was formally opened on 29 October 1998 and was immediately adjourned, the substantive conference was held on 26 November 1998. A record of the conference has been placed on the Commission's public register.
- 7.3 The main issues raised at the conference, and in written submissions, are outlined below.

Lack of Consultation

- 7.4 The FSCPC, Xamax Consultancy ('XC'), Australian Computer Society ('ACS'), Communications Law Centre ('CLC'), Australian Privacy Foundation ('APF') and the APCC submitted that the Code of Practice had not been the subject of sufficient public consultation and urged that such consultation take place.
- 7.5 The FSCPC submitted that ADMA's claim that its Code was the result of three years of consultation with consumer bodies was untrue. It alleged that six consumer bodies, who ADMA listed in its press release as having been consulted, deny that this is the case. These bodies are the APCC, CFA, Australian Consumers Association ('ACA'), Australian Telecommunications Users Group ('ATUG'), Policy Network ('PN') and the CLC. Those bodies claim that while they did have some opportunity to participate in the drafting of the Model Code, the National Principles for the Fair Handling of Personal Information ('NPPs') and involvement in the Austel Privacy Advisory Committee ('APAC'), they were never consulted directly regarding ADMA's Code of Practice. The FSCPC and the Australian Telemarketing and Call Centre Association ('ATCCA') also requested that the Commission delay its determination of A40077 on the basis that authorisation of the ADMA Code of Practice would end the opportunity for competition amongst the ATCCA, ADMA and the Internet Industry Association ('IIA') in code development that may possibly result in higher consumer standards.
- 7.6 The Consumer Affairs Division of the Treasury ('CAD') stated that the ADMA Code draws heavily on the Model Direct Marketing Code that was developed in consultation with consumer groups, industry and other government agencies, and is consistent with the Commonwealth government policy of supporting industry self-regulation. It was submitted that both the ADMA Code and the Model Code contain

extensive review provisions and any operational issues that arise can be addressed through those processes.

Lack of Coverage

- 7.7 It was submitted by the FSCPC that the extent of ADMA's coverage should be the subject of further research and assessment before the Code of Practice is authorised. The FSCPC submitted that the test in this case should be an investigation of the volume of direct marketing contacts that will be covered by ADMA's members, including unsolicited mail, unsolicited e-mail and telemarketing. It submitted that the extent of coverage is one of the most important factors in assessing any likely public benefit from authorising the Code, and that in ADMA's case coverage would be insufficient. The FSCPC argued that an authorised Code providing inadequate or fractional coverage worsens the position for consumers who may believe that their privacy is protected when, in fact, it is not.

Scope of the Code

- 7.8 The APCC, the federal Privacy Commissioner ('PC'), FSCPC, ACA and the Consumer Credit Legal Service ('CCLS') submitted that the scope of the Code of Practice was too narrow for a number of reasons:
- Situations where marketing material is sent with the intention of inducing a recipient to visit a retail outlet to buy goods or services are not covered by the Code. It was submitted that while some areas of the Code such as quality guarantees and cooling off periods appropriately apply only to situations where goods are purchased at a distance, issues of privacy arise with respect to the targeting of all direct marketing material. It was argued that public benefit would be increased if Part E applied to all forms of personalised, unsolicited advertising or other forms of solicitation engaged in by ADMA members.
 - Most of the conditions in the Code of Practice apply specifically to direct marketers which is defined narrowly in clause 3.5 of Appendix 1 of the Code of Practice. It was argued that this definition excluded many ADMA members, including fundraisers. The CCLS submitted those provisions in the Code attempting to bind employees, agents or subcontractors would not adequately address this limited scope.
 - The Information and Security Law Division of the Commonwealth Attorney-General's Department (A-G's) expressed concern that the Code gives the impression that it will apply to all ADMA members, and that the definition of 'direct marketer' contained in the Code is narrower than that which is commonly accepted by consumers. In these circumstances, A-G's was concerned that the potential existed for consumers to misinterpret the actual scope and application of the Code.

Privacy

- 7.9 The consumer data protection provisions contained in Part E of ADMA's Code of Practice were the subject of much comment. While acknowledging that these provisions were largely based on the NPPs that were released by the PC in 1998, a number of interested parties expressed concern about their application in the Code of Practice.

Interpretation of Clauses 9.1 and 9.3 – 'the use exception'

- 7.10 The APCC submitted that it is unclear whether the 'use' exception contained in clause 9.3 of the Code of Practice amounts to an additional ground for use, or whether it is a supplementary condition on use when information is intended to be used for the purposes of direct marketing. It expressed concern that ADMA had interpreted the provision as an additional ground for use in the Code of Practice. In a submission tabled at the pre-decision conference, the PC stated that it was her preliminary view that cl.9.1 and 9.3 (and their equivalent NPPs 2.1(a) and 2.1(c)) were independent alternatives; in order to use personal information, a direct marketer need only meet the requirements in one of those clauses. The PC noted, however, that principle 2.1(c) is limited to uses of personal information within the collecting organisation; it does not permit disclosures to other organisations. If an organisation wanted to disclose personal information for direct marketing purposes, it would have to meet one of the other exceptions within NPP 2.1, most probably the 'consent' exception at 2.1(b).

ADMA's Do Not Call/Do Not Mail Facilities

- 7.11 The opt out system that ADMA members are required to use by clause 33 of the Code of Practice was also criticised. The APCC expressed the view that the exception for current customers was unacceptable, it argued that a customer's expressed preference not to receive unsolicited approaches, should not be overridden because the customer chooses to purchase goods and services. The APCC also argued that ADMA should be required to show cause for ceasing to respect preferences after a particular period.
- 7.12 Mr Robin Whittle of First Principles submitted that ADMA's Do Not Call and Do Not Mail services have serious privacy problems. He said that to prevent phone calls, individuals must give their name, address and phone number; all of this information would then be distributed to ADMA's members. He said that ADMA had no way of controlling what its members or their employees did with these lists. Mr Whittle argued that the best way to protect consumers was to adopt an opt-in approach but alternatively, there existed a better opt-out approach. Mr Whittle's preferred approach involves the existence of a single, independent body to maintain a list of opted-out telephone numbers of business and residential customers. Under this approach direct marketers forward a list of numbers, or names, addresses and numbers, to the independent body, and for a fee, the body filters the list; returning it with a character or database field to flag those numbers that should not be called because they are on the opted out list. A filtering service of this type is currently being run by the American Computer Group and is called the Telephone Preference Scheme

“SAFETps”. Mr Whittle said that the same company operates similar filtering services for direct mail and e-mail addresses.

- 7.13 The FSCPC also submitted that the Do Not Call / Do Not Mail services should be administered by a trusted third party to ensure consumer confidence.

Public Benefit of the NPPs and their Application to Specific Industries

- 7.14 Professor Graham Greenleaf and the FSCPC submitted that the Commission, in its draft determination had not examined whether or not the substance of Part E of the Code is in the public interest. Professor Greenleaf said that in developing the NPPs the PC did not consider public benefit issues, her concern was principally to find a consensus between business and privacy groups.
- 7.15 The APF, APCC and FSCPC stated that it was their understanding that the NPPs would be developed at a general level and would then be adapted to apply to specific industry sectors. The FSCPC suggested the following additions:
- the removal of personal information from lists held by list brokers;
 - the provision of information on whether personal information will be used for list rental; and
 - the provision, where asked, of information about where a direct marketer has obtained a person’s details.

Trans Border Data Flows

- 7.16 With respect to trans border flows, the New South Wales Privacy Committee (‘NSWPC’) was concerned that Cl.30.1 allows for the avoidance of consent from data subjects if the transferor of the data and the transferee make a contract containing information-handling provisions. Due to privity of contract the NSWPC argued that data subjects would have no remedy if the recipient organisation ignores the information handling provisions. With respect to cl.30.5, the NSWPC expressed concern that the Code of Practice allowed trans border data flows where such flows would benefit the individual concerned. It argued that this provision was very subjective and open to abuse, given that ADMA sees direct marketing itself as a benefit to customers.

Implementation of Private Sector Privacy Legislation

- 7.17 Professor Greenleaf made the following submissions with respect to the government’s announcement that privacy legislation will be extended to cover the private sector:
- there will soon be a parliamentary process under way which will determine by legislation, the standard of privacy protection that parliament considers to be in the public interest.

- there will be a statutory procedure whereby proposed codes of conduct such as ADMA's Code, can be tested in terms of their compliance with the statutory standard and authorised if satisfactory.

7.18 In these circumstances, Professor Greenleaf submitted that if the Commission is minded to give authorisation to ADMA's Code, it should only do so as an interim authorisation under s.91 (2)(d) of the Act. Professor Greenleaf stated that this course of action would recognise:

- the incomplete status of the NPPs as a guide to public benefit in privacy protection;
- the likelihood of the need for variations to any authorisation once these legislative developments unfold; and
- the current level of uncertainty in Australian public policy on what constitutes an appropriate level of privacy protection in the private sector.

7.19 The APCC submitted that in light of the government's announcement any authorisation of the Code of Practice should be strictly time limited until such time as the Code is reviewed under the arrangements that will be put in place under privacy legislation.

Other Comments

7.20 A-G's submitted that the provisions contained in the Code of Practice relating to data protection are appropriate and reflect international and national standards for personal data protection. While congratulating ADMA on implementing the NPPs, A-G's also stated that amendments to the enforcement provisions of the Code are needed to ensure that the privacy protection that is provided by the Code of Practice is effectively implemented by complaint handling and enforcement mechanisms.

Electronic Commerce

7.21 While most interested parties showed in principle support for regulation of electronic commerce, the electronic commerce provisions contained in Part D of the Code of Practice were criticised on a number of grounds. Mr Robin Whittle and the APCC argued that the provisions were weak and vague.

7.22 Electronic Frontiers Australia ('EFA'), the Australian Computer Society ('ACS') and Doctor Roger Clarke of XC were very critical of clause 1 of Section D. Clause 1 states that the same level of protection provided by the practices that apply to other methods of commerce should be afforded to customers who participate in electronic commerce. EFA, ACS and XC argued that special problems arose with respect to electronic commerce that required special attention. The problems outlined included the following:

- Unsolicited commercial e-mail has a more serious impact on the consumer due to the intrusive use of e-mail incorporating substantial data attachments and the use of 'push' technology where selected data can be automatically delivered into a user's computer at prescribed intervals or based on some event that occurs. It was argued that this was not only intrusive, but also costly in terms of the time taken to read and delete the mail and the capacity to clog up e-mail systems.
- Because an e-mail address may be controlled by more than one person it is difficult to verify the identity of the people on either side of the transaction.
- Internet traders are not required to have a business premise address or contact details by phone or facsimile. This makes it difficult for e-commerce consumers to seek redress in the event of a dispute. Further, disputes over matters such as the currency in which transactions and refunds are made are also potentially more difficult for consumers in the event that there is no physical location of the business, or it is too distant from the consumer to enable easy return of goods. It was argued by EFA that dispute resolution processes for electronic commerce should therefore be provided on-line.
- Consumers are unable to make anonymous purchases when they buy on the Internet, they usually have to display an e-mail address and often have to provide their credit card details. This means that purchases on-line provide opportunities for data-mining that are not available for other forms of commerce. Dr Clarke stated that various programs have been designed to assist with this process, for example, software programs that can handle data supplied to search engines, customised news bulletins and cookies that are capable of providing considerable insight into a person's interests. Cookies are a record that can be stored on a consumer's local hard disk, they record data about web-sites that have been visited by the user.
- Whereas the cost of using post and telephone are generally borne by the sender, receivers often bear the cost of communications over the Internet, direct marketing may therefore impose financial costs on receivers. The ACS submitted that while present tariffs used by ISPs are a mixture of connection time, transmission volume and subscription, this may change towards volume based charging as the dominant way of collecting money from consumers. Because e-mails are no longer just text-based but are able to transmit voice and video, this substantially increases the costs that may be borne by receivers of direct marketing mail. For these reasons ACS argued that opt-out provisions were not sufficient to protect Internet users and that opt-in provisions would be more appropriate for this form of commerce.
- There is a clash in ethos on the Internet. Dr Clarke submitted that the Internet was originally developed on a community minded basis but is now becoming increasingly commercially oriented.

7.23 The FSCPC and the EFA submitted that electronic commerce issues should be removed from the Code of Practice. XC submitted that the Code of Practice should be

the subject of further consultation and should advocate an opt-in approach with respect to unsolicited e-mail.

Enforcement

- 7.24 Most of the parties that provided submissions agreed with the conditions contained in the Commission's draft determination. Many, however, believed that these conditions did not go far enough.
- 7.25 Professor Greenleaf, FSCPC, NSWPC and the PC stated that the Commission must ensure that the sanctions and remedies that ADMA is empowered to recommend are adequate and sufficient to protect consumer's interests. It was also submitted that the substance of these sanctions must be sufficient to meet international privacy standards otherwise Australian direct marketers would face prohibition on the import of any personal information for use in direct marketing from Europe, Hong Kong and other jurisdictions with personal data export prohibitions.
- 7.26 With respect to compliance mechanisms for an effective information privacy scheme the PC submitted a preliminary view that:
- Any framework must provide a mechanism by which organisations can commit themselves to complying with the principles. This would include: effective incentives such as sanctions of one kind or another for organisations to comply with the Principles; a reliable and independent mechanism for monitoring compliance with, and reporting on the effectiveness of the scheme, and providing individuals with access to an accessible, affordable, timely and independent mechanism for complaint handling and dispute resolution.
 - Action taken as a result of investigations should aim to provide redress to individuals who have been adversely affected by a breach of the principles, and to prevent breaches from recurring.
 - Redress should involve providing a formal apology for the breach; taking remedial action such as correction or deletion of relevant records; and where appropriate, paying compensation for harm or damage directly resulting from a breach. These should be part of what is meant by specified remedial action in the first dot point of paragraph 17 of Part F.
 - The absence of any reference to compensation for individuals affected by a breach is a serious deficiency. More serious privacy breaches can sometimes inflict significant financial disadvantage, and serious social and psychological consequences, on the affected individuals. In such cases; financial compensation is the only means of effective redress. The CLCV, Graham Greenleaf, and the FSCPC supported this point.
 - In order to prevent recurring breaches of the Code the administrator could require the organisation to take positive steps to prevent recurrence of the breach, eg, providing undertakings, implementing better security

arrangements; improving public notification of information handling practices etc. The PC presumes that this is what the Code means at paragraph 17 of Part F.

- 7.27 Professor Greenleaf submitted that the Commission's suggested amendment that ADMA provide for the reporting of complaints in ADMA's annual report was inadequate given that most consumers and their representatives do not have access to such reports. Professor Greenleaf suggested that ADMA's complaint handling should also be reported via its Internet site.
- 7.28 The CLCV suggested that further amendments are required if public benefit is to be derived from the Code. These suggested amendments included:
- independence of consumer representatives must be guaranteed;
 - the Authority should have an odd number of members so that hung decisions are avoided and there should be a majority of non-industry representatives;
 - the precise role of the Compliance Officer and the terms and conditions of their employment should be defined;
 - evidence referred to in Cl.F.8 should be provided to the complainant as well as the ADMA member;
 - the Authority should be empowered to make binding determinations without reference to the Board; and,
 - the Code should state that the Authority would apply rules of procedural fairness to reviews of decisions of the Compliance Office.

Outbound Telemarketing

Calling Times

- 7.29 The allowed 'cold – calling' times were criticised as too generous by the CLCV, FSCPC, NSWPC, APCC and Mr Robin Whittle of First Principles. A number of suggestions were put forward for limiting these hours. These suggestions included:
- making Sunday a call-free day;
 - providing a free silent line service; or
 - developing a Code with much wider coverage and then consulting with consumers about acceptable hours.
- 7.30 Alternative spans of hours that parties suggested might be appropriate, included from 9am to 8pm on week days, 9am to 5pm on Saturdays and the prohibition of calls on Sundays and public holidays. These are the hours incorporated in the *Door to Door*